No. 16-1140

IN THE
Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, dba NIFLA, et al.,

Petitioners,

v.

XAVIER BECERRA, Attorney General of California, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE STATES OF NEW YORK, CONNECTICUT, DELAWARE, HAWAI'I, ILLINOIS, IOWA, MAINE, MARYLAND, MASSACHUSETTS, MINNESOTA, NEW JERSEY, OREGON, PENNSYLVANIA, VERMONT, VIRGINIA, AND WASHINGTON, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

The California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (FACT Act) requires certain state-licensed medical clinics to notify their patients that the county health department offers information about "public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women." Cal. Health & Safety Code § 123472(a)(1). The California Legislature adopted this modest disclosure requirement to protect public health and ensure that patients facing highly personal and time-sensitive decisions about pregnancy are fully informed of the medical-treatment options available to them.

The amici States address the following question:

Whether the FACT Act's requirement that state-licensed medical clinics notify their patients about the availability of public programs providing free or low-cost medical services is permissible under the Free Speech Clause of the First Amendment.

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INTEREST OF THE AMICI STATES

This case addresses whether the First Amendment permits California to require certain state-licensed medical clinics to disclose indisputably accurate information needed to enable patients to make time-sensitive decisions about the healthcare they will receive during their pregnancies. One of the statutory provisions at issue requires clinics to disclose a simple, uncontroverted fact: that patients may call the county health department to access information about public programs that provide free or low-cost healthcare services to women who are pregnant or planning to be pregnant—including prenatal care, contraception, and abortion.[1] Petitioners challenge this disclosure requirement under the Free Speech Clause of the First Amendment.

Amici States of New York, Connecticut, Delaware, Hawai'i, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Jersey, Oregon, Pennsylvania, Vermont, Virginia, and Washington, and the District of Columbia, have long used disclosure requirements to ensure that state residents receive the information they need to make timely, well-informed decisions involving their health, safety, and legal rights. For example, disclosure rules direct

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[1] Another provision of the statute requires unlicensed clinics to disclose that the facility "is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services." (Pet. App. 81a.) Amici States agree with the arguments of California and the United States that this disclosure satisfies the First Amendment (Resps. Br. 16-27; U.S. Br. 33-36), and will not separately address the unlicensed-clinic disclosure at any length here.

hospitals to give parents information about safe parenting practices, mandate that physicians advise terminally ill patients about palliative-care options, and require health practitioners to notify people about vaccinations. Amici States have a compelling interest in ensuring that they may continue to rely on such modest disclosures of undisputed facts to provide important information to their residents.

Based on their extensive experiences crafting and implementing disclosure rules, the amici States are also well situated to inform the Court about the ways in which California's modest disclosure requirement appropriately protects both the informational interests of patients who are seeking pregnancy-related care and the speech interests of clinics that provide such care. The disclosure rule protects patients by providing them with important information about pregnancy-related services early enough that they can make fully informed decisions about the most appropriate medical care for their circumstances—whether prenatal care of various kinds, or abortion induced by medication or surgery. And the rule preserves clinics' speech interests by requiring only a neutral disclosure of uncontested facts about the availability of free or low-cost pregnancy-related services—including not only services provided by the clinics (such as prenatal care), but also other services that California has reasonably determined women should be aware of before committing to important healthcare choices affecting their pregnancies. In the States' experience, other disclosure methods—such as a general public information campaign—are less effective at reaching pregnant women during the precise time when they are seeking or receiving pregnancy care and thus most likely to pay attention to pregnancy-related information.

STATEMENT

This case addresses the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (FACT Act), which the California Legislature enacted to ensure that women timely obtain the information they need to make fully informed decisions about pregnancy and care. (*See* Pet. App. 76a-78a; J.A. 54a-58a.) The FACT Act requires certain state-licensed clinics that offer pregnancy-related medical services to provide to their patients the following short disclosure (the Medical Services Disclosure):

> California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number].

(Pet. App. 80a.)

This disclosure rule applies to clinics that are licensed by California to provide medical care; operate with the "primary purpose" of "providing family planning or pregnancy-related services"; and satisfy two of six enumerated criteria. (Pet. App. 78a-79a.) Cal. Code Regs. tit. 22, § 75026 (clinics must provide medical services through persons authorized by law to provide such services); *id.* § 75027 (clinics must designate licensed physician as professional director and have licensed practitioners present when medical services are provided). The enumerated criteria are: (1) offering pregnancy testing or diagnosis; (2) offering

obstetric ultrasounds or prenatal care; (3) advertising pregnancy tests, prenatal sonography, or pregnancy options counseling; (4) offering abortion services; (5) providing contraceptive methods or counseling about contraception; and (6) collecting health information from patients. (Pet. App. 78a-79a.)

Clinics may provide the disclosure in one of three ways: a printed notice, digital notice, or a sign posted in the clinic. (Pet. App. 80a-81a.) Clinics also may provide the notice in combination with other mandated disclosures. (Pet App. 81a.)

In adopting this modest disclosure rule, the California Legislature determined that to make careful and fully informed decisions about pregnancy care, women need to know about the full spectrum of pregnancy-related services available to them, including prenatal care, health education, abortion, delivery, and contraception. (Pet. App. 76a-77a; *see* J.A. 66, 70.) As the American Nurses Association explained in supporting the Act, informing pregnant women about the full range of available options and funding resources ensures that "pregnant women receive the information they need to make an informed decision" about the healthcare they will receive. (J.A. 43-44.) *See* Act 200, § 1, 29th Leg., Reg. Sess. at 3 (Haw. July 11, 2017) (Hawai'i Legislature explaining that similar disclosure law allows pregnant patients to quickly obtain information needed to make informed and timely decisions about reproductive health).

The California Legislature found that the extremely time-sensitive nature of many pregnancy-related decisions renders receipt of information early in pregnancy particularly critical for patients. (Pet. App. 77a; *see* J.A. 70.) For example, patients who lack

sufficient information about free or low-cost medical-care services may not obtain prenatal care, even though "care early in pregnancy is important" to maintaining maternal and fetal health. (*See* Pet. App. 77a.) *See* Act 200, § 1, at 2 (Hawai'i Legislature's findings); National Insts. of Health, U.S. Dep't of Health & Human Serv., *What is prenatal care and why is it important?* (internet).[2] Women who remain unaware of accessible pregnancy services may not be able to make an informed decision about whether to undergo a medication-induced abortion, a procedure which is much less complex than a surgical abortion and which is often available only early in pregnancy. *See* American Coll. of Obstetrics & Gynecologists, *Frequently Asked Questions: Special Procedures* 2-3 (May 2015) (internet). And if a lack of information causes a woman to delay her pregnancy-related decisions too long, she may lose entirely her right to make the difficult and personal choice to undergo an abortion because many States generally prohibit abortion after a certain gestational age. *See* Guttmacher Inst., *An Overview of Abortion Laws* (Feb. 1, 2018) (internet).

The California Legislature also emphasized that these public-health and patient-protection concerns had been heightened by the practices of many limited-service clinics. (*See* J.A. 39-41). Limited-service clinics are facilities that provide only some pregnancy-related services—such as obstetric ultrasounds, pregnancy testing, and pregnancy diagnosis—but that do not provide or refer patients to the full range of available healthcare options, including abortion services, often

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[2] For sources available on the internet, full URLs are in the Table of Authorities.

because of their opposition to such options. *See* Family Research Council, *A Passion to Serve: Pregnancy Resource Center Service Report* 7-11, 16-21 (2nd ed. 2011).

Indeed, as the California Legislature explained, many limited-service clinics engage in practices that prevent pregnant women from learning about the full range of available pregnancy-related services, thereby delaying patients' ability to make fully informed decisions about the healthcare they can or will receive during pregnancy. (*See* J.A. 39-41, 85.) For example, as inquiries by state Attorneys General and federal and municipal legislators have confirmed, many limited-service clinics mislead or confuse patients into thinking that they can access abortion services by visiting such a clinic when it does not actually offer abortions. *See* N.Y. Att'y Gen., Press Release, Spitzer Reaches Agreement with Upstate Crisis Pregnancy Center (Feb. 28, 2002) (internet).[3] Some limited-service clinics mislead women into declining an abortion by telling patients that they "may be at risk for miscarriage and that abortion may therefore be unnecessary"—even when the likelihood of a miscarriage is low. *See* Joanne D. Rosen, *The Public Health Risks of Crisis Pregnancy Centers*, 44 Persps. on Sexual & Reprod. Health 202 (2012); *see also* Andrea Swartzendruber, et al., *Sexual and Reproductive Health Services and Related Health Information on Pregnancy Resource Center Websites: A Statewide*

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[3] *See also* U.S. House of Representatives, Comm. on Gov. Reform—Minority Staff, *False and Misleading Health Information Provided by Federally Funded Pregnancy Resource Centers* 1-2 (July 2006); N.Y. City Council, Comm. on Women's Issues, Report on Int. Local Law No. 371, at 5-6 (Nov. 16, 2010).

Content Analysis, 28 Women's Health Issues J. 14, 17-18 (2018). Some limited-service clinics falsely tell patients that an ultrasound provided by the clinic can predict the likelihood of miscarriage, despite the fact that ultrasounds do not provide such information. *See* Swartzendruber, *supra*, at 17-18. And limited-service clinics have told patients that "abortions are legal throughout pregnancy" and that patients can thus wait to decide whether to undergo an abortion—even though late-term abortions are often prohibited or severely restricted by state law. Rosen, *supra*, at 202.

The California Legislature concluded that "the most effective way to ensure that [pregnant] women timely obtain" the information they need to make decisions about pregnancy was to require licensed clinics that provide pregnancy-related services to notify patients about the full spectrum of free or low-cost pregnancy services available in the State. (J.A. 49; *see* J.A. 70.) As the Legislature explained, unlike a general statewide information campaign, the disclosure requirement ensures that pregnant patients learn about available pregnancy-related services while they are seeking or obtaining medical care for a pregnancy and thus likely to be paying attention to this information. (J.A. 70.)

SUMMARY OF ARGUMENT

I. California's Medical Services Disclosure fits squarely within a long tradition of disclosure requirements that have been widely adopted by the States and routinely upheld by the courts. States enact disclosure rules to ensure that their residents are properly equipped to make well-informed decisions affecting their own health, safety, and well-being.

Such laws arise in different contexts, but they share the common feature of providing people with important information at a time when they can still meaningfully consider that information in making a decision. And for healthcare in particular, disclosure requirements ensure that patients are fully informed about available treatment options before committing to a choice—thus ensuring that patients, not providers, have the final say over decisions affecting their own bodies.

California's Medical Services Disclosure operates in the same way and serves the same public purposes as many other valid disclosure rules. The disclosure notifies patients who are pregnant (or considering pregnancy) about the full range of free or low-cost pregnancy services that are available in California—indisputably accurate information that is critical for patients making highly personal and time-sensitive decisions about the healthcare they will receive during their pregnancies. And the disclosure conveys this information to patients early enough—when they are seeking or receiving pregnancy services from medical clinics—that they are still able to use this information to make time-sensitive choices about appropriate healthcare. Indeed, absent the disclosure, patients who remain unaware of available public services might lose the ability to make an informed decision about whether to obtain early prenatal care, a medication-induced rather than surgical abortion, or any abortion at all.

II. Like many other valid disclosure laws, the FACT Act comports with the First Amendment by requiring a modest disclosure of "purely factual and uncontroversial information" that is "reasonably related" to the State's patient-protection interests.

Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985).

First, the Act requires clinics to disclose solely undisputed facts: that public programs in California offer free or low-cost comprehensive pregnancy services, including prenatal care, abortion services, and contraceptive methods, and that patients can obtain more information about such services by calling a county health department's telephone number. Contrary to the contentions of petitioners and their amici, these uncontroverted facts are not "controversial" under *Zauderer* simply because the topic of abortion is a matter of public debate. Many disclosure laws reference facts that touch on issues of public controversy, such as vaccination requirements, palliative-care options, or minimum-wage rules. Under *Zauderer*, such disclosures remain "uncontroversial" so long as they contain only uncontroverted facts, even if a regulated entity would prefer not to provide those facts to its customers. And beyond even what the First Amendment requires, the Medical Services Disclosure is particularly respectful of the clinics' speech: it describes comprehensive pregnancy-related services, rather than focusing on abortion alone; it gives clinics flexibility to provide the disclosure in multiple ways; it specifies that the comprehensive services referenced in the disclosure are offered by others, and thus not endorsed by the clinics; and it leaves clinics free to convey any additional information or messages that they wish.

Second, contrary to the arguments of petitioners and their amici, the fact that California requires clinics to mention certain services—i.e., abortion—that the clinics do not themselves provide directly supports, rather than undermines, the value of the

information conveyed by the Medical Services Disclosure to patients. The relevant question here is whether the facts required to be disclosed are material to the choice that patients are making when they arrive at these clinics. Facts about the clinic's own services certainly satisfy this standard. But so too do facts about other services that a State could reasonably believe are important for a patient to know in order to make a fully informed choice. Many other disclosure rules follow the same model and require regulated entities to provide information—including the availability of public or private resources offered by others—to give particular individuals the full spectrum of information relevant to the choice they are making.

Third, suggested alternative means of disseminating the information contained in the disclosure—such as a publicly funded education campaign—would be less effective than the Medical Services Disclosure. An education campaign aimed at the general public is likely to reach most women when they are not pregnant or considering becoming pregnant, and are thus not likely to pay attention to information about pregnancy services. The Medical Services Disclosure reasonably addresses this problem by ensuring that women receive pregnancy-related information when they seek or receive pregnancy care from a clinic and thus actively need the information to make pregnancy-related decisions.

ARGUMENT

I. Like Many Required Disclosures, the Medical Services Disclosure Ensures that State Residents Receive the Information They Need in a Timely Manner to Make Fully Informed Decisions.

California's Medical Services Disclosure fits squarely within a vast array of disclosure rules that the States have adopted and that the courts have routinely upheld. Disclosure requirements serve critical public purposes by timely and effectively providing individuals with important information that they need to make well-informed decisions about not only the products or services they use but also their own health, safety, and well-being. In doing so, disclosure rules further important state interests in a far less intrusive manner than outright prohibitions on speech or direct regulations of conduct. *See Zauderer*, 471 U.S. at 650-51; *see also Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 369 (2010) ("The Court has explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech"). And disclosure requirements respect the autonomy of individuals by giving them the full breadth of information they need to make a free choice, rather than dictating their choices for them.

Disclosure mandates accomplish these public purposes by requiring the entities that offer goods and services to the public to provide their consumers with factual information relevant to the choices that these individuals are about to make. Timing is critical for such disclosures: if they come too early, when the intended audience is not yet considering the relevant issue, it is unlikely that people will retain the

information; but if the disclosure comes too late, the decision may already be made, and the information no longer useful.

The state interests that justify disclosure laws are sometimes triggered by aspects of the specific products or services that an entity offers. For example, entities that offer products that expose people to health or safety risks are often required to disclose those risks. Manufacturers must label products that contain hazardous materials. *See, e.g.*, 15 U.S.C. § 1261(p) (disclosure includes signal words such as "danger" or "poison" and first-aid instructions); *National Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 107, 113-16 (2d Cir. 2001) (disclosure of mercury and disposal instructions). Establishments or companies that sell alcoholic beverages must warn patrons that drinking alcohol may cause health problems and birth defects. *See* 27 C.F.R. § 16.21; 24 Rules of City of N.Y. § 1-01. Food purveyors must notify customers about the health implications of consuming certain foods. *See, e.g.*, 21 U.S.C. § 343(q) (food labels must list calories, total fat, cholesterol, sodium, and sugars); N.Y.C. Health Code § 81.50 (certain restaurants must post calorie content of menu items); N.J. Stat. § 26:3E-17 (same). And real-estate sellers must advise home-buyers about the presence and dangers of lead paint, lead pipes, asbestos, and other toxic substances in a residence. *See* 42 U.S.C. § 4852d (lead paint); 40 C.F.R. § 745.107 (lead paint); N.Y. Real Prop. Law § 462 (pipes, asbestos, toxic substances). As these examples demonstrate, such disclosure rules are crafted to provide information to state residents while they are considering buying or using a product or service, thereby maximizing the likelihood that people

will consider the risks when making decisions about what to buy or use.

Healthcare disclosures sometimes serve the same purpose—such as requirements that physicians inform patients about the risks of a particular medical procedure to ensure that a patient can give fully informed consent to undergo that procedure. *See* Texas Br. 6-7. But mandatory disclosures in this field are not limited to providing information about a physician's own services. States also often require disclosures to ensure that patients are aware of the full range of healthcare options available to them, and the consequences of each option—so that, for example, nobody selects a difficult and risky surgery without at least knowing that less invasive nonsurgical options are also available, even if those options may also be less effective. Thus, certain hospitals and healthcare facilities must inform patients about their rights under state law to "make decisions concerning such medical care, including the right to accept or refuse medical or surgical treatment and the right to formulate advance directives." 42 U.S.C. § 1395cc(f)(1)(A).[4] And in several States, including Massachusetts and Minnesota, healthcare providers must disclose the estimated costs of medical care options to patients who request such information. *See* Mass. Gen. Laws ch. 111 § 228; Minn. Stat. §§ 62J.81, 62J.823. Just like informed-consent laws, these disclosures advance the States' compelling interests in

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[4] *See also* Conn. Gen. Stat. § 19a-580h(c) (prior to requesting signature for life-sustaining treatment, provider must discuss patient's goals and documenting wishes for end-of-life treatment); Mass. Gen. Laws ch. 111 § 70E (disclosure of patients' rights); N.J. Stat. § 26:2H-12.9 (same).

promoting public health and protecting patients by providing patients with important information on which to base their healthcare decisions. And these disclosure rules do so by conveying the information to patients while they are seeking or receiving medical care and thus contemplating the very decisions for which the information is important—including the decision whether to go forward with the particular treatment option offered by a provider.

Because patients' healthcare decisions are often time sensitive, States routinely determine that the best avenue for making these disclosures is to have healthcare providers themselves give the information to patients directly, because the providers are likely interacting with the patient at the very moment when they are considering the choice that may be affected by that information. For example, in some States, maternal health facilities must post information about the rights of breastfeeding mothers or the dangers to pregnant women of eating foods containing mercury.[5] Many States require providers of childbirth services to give patients information about, among other things, shaken baby syndrome, sudden infant death syndrome, safe infant sleeping practices, or newborn hearing screening programs.[6] Healthcare facilities and schools (including private schools) that serve parents and children are often required to disseminate information

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[5] *See* N.Y. Pub. Health Law § 2505-a(1); N.J. Stat. § 26:2-179.

[6] *See* N.Y. Pub. Health Law § 2803-j(1-c), (1-d); Cal. Health & Safety Code § 1254.6; Fla. Stat. §§ 383.311, 395.1053; Ill. Comp. Stat. ch. 210, 85/11.7; *id.* ch. 410, 260/20; Mich. Comp. Laws § 333.5885; Neb. Revised Stat. §§ 71-2101, 71-2103; N.J. Stat. § 26:2-103.5; Ohio Rev. Code § 3701.64; Tex. Health & Safety Code § 161.501; Wis. Stat. § 253.15.

about vaccinations—such as the risks and benefits of immunizations or a list of state-mandated inoculations.[7] And in several States, physicians who diagnose a patient with a terminal illness must offer to discuss palliative-care options with the patient, such as hospice care and the patient's legal rights to "comprehensive pain and symptom management at the end of life."[8] In each of these examples, requiring the provider to disclose specific factual information to its patients will funnel such information to the right people at the right time.

The Medical Services Disclosure operates in the same way and serves the same goals as the many other disclosures that States rely on to protect patients and promote public health. Like other disclosure requirements that address safety, health, or medical treatment, the Medical Services Disclosure provides patients with basic facts that are critical to making highly sensitive and difficult decisions. Any patient seeking or receiving pregnancy-related medical

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[7] *See* N.Y. Pub. Health Law § 2167(2)(c) (colleges must distribute information about meningitis immunizations); N.J. Stat. §§ 26:2N-3, 26:2N-7.1 (hospitals and birthing facilities must provide information about pertussis vaccine, including risks of pertussis, mortality rates among infants suffering from pertussis, and efficacy of vaccine); Tex. Health & Safety Code § 161.501(a) (provision of resource pamphlet containing list of diseases subject to mandatory immunizations).

[8] *See* N.Y. Pub. Health Law §§ 2997-c(2)(a), 2997-d; Cal. Health & Safety Code § 442.5(a)(1) (disclosure of right to "comprehensive information and counseling regarding legal end-of-life options"); Mich. Comp. Laws § 333.5655(c) (disclosure that patient may choose palliative-care treatment); Vt. Stat. tit. 18, § 1871(b) (terminally ill patient has "right to be informed by a clinician of all available options related to terminal care").

services faces a host of choices "fraught with consequences," *see Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992) (plurality op.), such as whether to obtain prenatal care and, if so, which types of care to pursue. And a patient whose pregnancy is unintended faces one of "the most intimate and personal choices a person may make in a lifetime": the choice either to continue her pregnancy or to terminate it. *Id.* at 853. To ensure that such choices are "mature and informed," *id.* at 881, the Medical Services Disclosure apprises pregnant women of the full range of free or low-cost pregnancy services that may be available to them—including prenatal care, contraception, and abortion.

The Medical Services Disclosure is also structured to provide this crucial information to pregnant patients while they are seeking or receiving pregnancy-related medical services and thus actively in need of information about the available service options. The clinics that are subject to the notification requirement are licensed by California to provide medical procedures and have the primary purpose of providing family-planning and pregnancy-related services. See *supra* at 3-4. By their nature, the clinics thus serve the precise individuals who need information about comprehensive pregnancy-related services. And the clinics interact with those patients while they are facing the difficult decisions for which such information is required. Just as physicians who diagnose a terminal illness are well situated to inform the patient about palliative care, the clinics are well positioned to inform pregnant patients about public programs offering comprehensive pregnancy care. (*See* J.A. 70)

Indeed, by requiring the clinics to issue the disclosure, California's statute ensures that patients obtain the needed information as early as possible during their pregnancies—a critical feature given the time-sensitive nature of pregnancy decisions. Clinics may be the first medical professionals to diagnose or discuss a patient's pregnancy. (*See* Pet App. 78a-79a.) Understanding the full spectrum of available free or low-cost pregnancy-related services is crucial for patients at this critical moment. Absent such information, a patient may decline to obtain prenatal care or may choose to terminate her pregnancy based on the incorrect conclusion that she could not afford medical treatment—a decision she "may come to regret" when she learns that free prenatal services were available all along. *See Gonzales v. Carhart*, 550 U.S. 124, 159 (2007). A patient who remains unaware of the available treatment options early in her pregnancy might also lose the ability to make an informed decision about whether to obtain a medication-induced abortion rather than a surgical abortion—removing what might be the best option for her. And a patient who delays her pregnancy-related decisions too long based on a lack of knowledge about pregnancy services might lose entirely her constitutional right to make a dignified and autonomous choice about whether to terminate her pregnancy because many States, including California, generally prohibit or severely restrict abortion after a certain point in a pregnancy. *See* Cal. Health & Safety Code § 123468(b). The Medical Services Disclosure avoids such consequences from a simple lack of knowledge by equipping each clinic patient with the information she needs to decide matters of "serious and personal consequences of

major importance to her own future." *Casey*, 505 U.S. at 916 (plurality op.).

II. California's Requirement of a Modest Disclosure of Uncontroverted Facts Comports with the First Amendment.

It is well-established that a State may require disclosure of "purely factual and uncontroversial information" that is "reasonably related" to a state interest and that is not "unduly burdensome." *Zauderer*, 471 U.S. at 651; *see Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249 (2010). Petitioners and their amici assert that this principle does not apply to California's Medical Services Disclosure because (a) the disclosure concerns a subject that petitioners strongly oppose; (b) the disclosure is not related to services that petitioners provide; and (c) there were other, better ways that California could have conveyed the same information to the intended audience. None of these limitations finds support in this Court's precedents, and accepting them would severely hobble the States' policymaking authority to use disclosures to convey critical information to their residents.

A. The First Amendment Permits Mandatory Disclosures of Uncontroverted Facts Even When the Regulated Entity Objects to Making the Disclosure.

1. The Medical Services Disclosure consists solely of uncontroverted factual information about services that are indisputably available to California residents.

By informing patients of medical services that are indisputably available in California, and providing them a telephone number they can call for more information, the Medical Services Disclosure contains "purely factual and uncontroversial information." *Zauderer*, 471 U.S. at 651. Because petitioners do not dispute the facts that they must disclose, *see American Meat Inst. v. United States Dep't of Agric.*, 760 F.3d 18, 27 (D.C. Cir. 2014) (en banc), the First Amendment allows California to mandate the disclosure of those facts.

Petitioners and their amici contend that the Medical Services Disclosure is controversial under *Zauderer*, and thus cannot permissibly be mandated, because the disclosure references a subject that petitioners strongly oppose—namely, abortion. *See* Pet'rs Br. 1-2, 17, 45, 49; *see, e.g.*, Texas Pregnancy Centers Br. 8. But the facts contained in the Medical Services Disclosure are not "controversial" under *Zauderer* simply because abortion is a matter of religious or public debate. *See* Pet'rs Br. 1, 17, 24-26, 39; U.S. Br. 24-25. Rather, the question under *Zauderer* is whether the facts in a mandatory disclosure are "uncontroversial" in the sense of being "uncontroverted"—i.e., not subject to dispute. *See*

Kimberly-Clark Corp. v. District of Columbia, No. 17-1901, – F. Supp. 3d –, 2017 WL 6558500, at *8 (D.D.C. Dec. 22, 2017) (disclosure is "controversial" when there is disagreement over "the facts required to be disclosed"). This limitation prevents States from requiring regulated entities to express opinions or values, rather than facts, or to support one side of a factual dispute. *See Zauderer*, 471 U.S. at 651; Jennifer M. Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment*, 15 U. Pa. J. Const. L. 539, 569-75 (2012) (*Zauderer* standards apply to factual information rather than opinions). But when a fact is not disputed, a regulated entity has only a "minimal" First Amendment interest in withholding that fact from the public. *Zauderer*, 471 U.S. at 651.

That interest is "minimal" even when, as here, the entity would strongly prefer not to disclose an indisputable fact. In *Milavetz*, this Court upheld a federal requirement that certain entities describe themselves as debt relief agencies despite the plaintiff's strong "preference...for referring to itself as something other than a 'debt relief agency'—e.g., an attorney or a law firm." 559 U.S. at 251. The disclosure complied with the First Amendment, despite the plaintiff's vehement objection to making it, because the facts conveyed were "necessarily accurate." *Id.* In other words, what was "uncontroversial" about the mandatory disclosure in *Milavetz* (as in *Zauderer*) was not the regulated entity's agreement with the disclosure, but rather the fact that the disclosure concerned an uncontroverted fact—even if it was one that the regulated entity would prefer not to have conveyed.

Indeed, disclosure requirements are often enacted precisely *because* regulated entities do not want to mention uncontested facts that a legislature has determined are important for people to know. For example, Congress determined that disclosing a food product's country of origin supplies consumers with critical food-safety information, and the D.C. Circuit upheld that mandatory disclosure even though food distributors strongly preferred not to make it. *See American Meat*, 760 F.3d at 21, 23-25. And New York City concluded that disclosing the calorie content in menu items provides restaurant patrons with important health and dietary information, even though restaurant owners did "not want to communicate... that calorie amounts should be prioritized" over other nutritional information. *New York State Rest. Ass'n v. New York City Bd. of Health*, 556 F.3d 114, 134-37 (2d Cir. 2009). Allowing such preferences to require application of strict scrutiny to disclosure rules, rather than the deferential scrutiny set forth in *Zauderer*, would impede the States' ability to make reasonable legislative judgments about the value of providing certain information to state residents in time to make personal decisions about their health and well-being.

Indeed, many mandatory disclosures of uncontroverted facts will touch on "important matter[s] of public concern" about which people will hold strong religious, political, or moral views. Pet'rs Br. 17; *see* U.S. Br. 24. Requiring those views to take precedence over the public interest in obtaining accurate information would significantly threaten the States' ability to rely on disclosure requirements. For example, employers could challenge labor-law disclosures based on vehement political objections to minimum-wage requirements, immigrant-worker

protections, or public enforcement of anti-discrimination laws. *See* Business Council of N.Y. State, Inc., Minimum Wage Legislative Memo in Opposition (Feb. 3, 2016) (internet) (opposing legislation to raise New York's minimum wage). And healthcare practitioners could undermine public-health disclosure rules by asserting strong religious or cultural opposition to vaccinations, palliative care, or certain medical treatments. *See* College of Physicians of Phila., *Cultural Perspectives on Vaccination, History of Vaccines* (Jan. 10, 2018) (internet); Steven M. Steinberg, *Cultural and Religious Aspects of Palliative Care*, 1 Int'l J. Critical Illness & Injury Sci. 154 (2011). Because the Free Speech Clause's protections are not limited "to religious activity and institutions alone" or to "any [particular] field of human interest," *Thomas v. Collins*, 323 U.S. 516, 531 (1945), all such objections would trigger heightened or even strict scrutiny under petitioners' view. *Cf. United States v. United Foods, Inc.*, 533 U.S. 405, 413 (2001) ("[S]peech need not be characterized as political before it receives First Amendment protection."). The sweeping and disruptive consequences of petitioners' theory demonstrate that the touchstone for *Zauderer* is not whether a disclosure touches on an issue of debate, but rather whether a disclosure contains only uncontroverted facts.

The information required by the Medical Services Disclosure falls squarely on the factual side of the line. There is no dispute that patients in California may access free or low-cost comprehensive medical services, including prenatal care, abortion services, and contraceptive methods; and there is no dispute that the telephone number listed in the disclosure will provide further information to interested individuals. The First Amendment permits California to require

licensed clinics to provide these uncontroverted facts about healthcare choices to their patients.

2. The narrow and cabined nature of the Medical Services Disclosure properly respects petitioners' strongly held views.

While a regulated entity's objection to conveying uncontroverted facts imposes no constitutional barrier to a disclosure requirement, States can and regularly do respect such strongly held views by crafting mandatory disclosures that come nowhere close to the limits imposed by the First Amendment. As California has explained (Resps. Br. 29), it strove to accommodate the moral beliefs of petitioners (and other similar facilities) by cabining the Medical Services Disclosure in several ways that further guard against any interference with petitioners' speech.

First, the Medical Services Disclosure is careful not to endorse any particular treatment for women. Rather, the disclosure simply informs patients of the availability of *comprehensive* pregnancy services, including not only abortion but also prenatal care for women who choose to maintain their pregnancies, and provides a telephone number to obtain more information. The disclosure thus does not put any thumb on the scale as to which options patients should choose. *Cf. Evergreen Ass'n v. City of New York*, 740 F.3d 233, 250-51 (2d Cir. 2014) (disclosure rule requiring clinics to state that health department "encourages" patients to "consult with a licensed provider" violated First Amendment).

Second, the statute provides clinics with considerable flexibility to provide the disclosure in one

of three ways, each of which is a familiar disclosure format that medical facilities already use to notify patients about many other undisputed facts. *See Milavetz*, 559 U.S. at 252 (upholding statute that provided "flexibility to tailor the disclosures to... individual circumstances"). Clinics may provide the notification by giving patients a simple form in hard copy or electronic format (Pet. App. 81a)—both of which are common methods for disclosing information to patients who are visiting healthcare facilities. *See* NYU Langone Health, *Patient Forms* (internet). Clinics are permitted to combine the notice with other required disclosures (Pet. App. 81a), such as information privacy notifications under the Health Insurance Portability and Accountability Act. *See* 45 C.F.R. § 164.520(c)(2). And clinics may post a small notice where patients may read the sign (Pet. App. 80a)—a disclosure format that abounds in a variety of contexts, including not only healthcare but also food service, construction, and employment. *See* Illinois Hosp. Ass'n, Hospital Patient and Visitor Signage: Illinois Requirements (2011) (internet) (listing seventeen signs that hospitals may need to post); New York City, NYC Checklist for Required Signs for Restaurants & Bars (2014) (internet) (listing forty nine signs that restaurant may need to post); N.Y. Dep't of Labor, Posting Requirements: New York State Posting Requirements (Non-Agricultural) (internet) (listing ten signs that employers may need to post).[9]

The ubiquity of the types of disclosure methods permitted under California's statute belies petitioners' contention (Pet'rs Br. 37-39) that complying with the

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[9] *See also* U.S. Dep't of Labor, *Workplace Posters* (internet) (listing ten signs that employers may need to post).

Medical Services Disclosure would be so burdensome as to "effectively rule[] out" the clinics' ability to convey their chosen messages about pregnancy and abortion to patients. *See Ibanez v. Florida Dep't of Bus. & Prof'l Regulation, Bd. of Accountability*, 512 U.S. 136, 146-47 (1994). As California explains (Resps. Br. 42-44), patients are already fully accustomed to receiving forms from their doctor or viewing signs in the doctor's office. Because these other familiar disclosures do not already interfere with petitioners' speech, there is no reasonable possibility that adding just one other form or sign would prevent petitioners from conveying their chosen message to their patients.

Third, the Medical Services Disclosure avoids burdening petitioners' speech by specifying that the medical services referred to in the notice are sponsored by California rather than the clinics, and that more information about those services may be accessed by contacting the county health department. (Pet. App. 80a.) This exclusive focus on public programs offered by others wards against any possible suggestion that the clinics offer or endorse any medical treatments that they actually oppose. The suggestion of the United States and petitioners' amici (*see* U.S. Br. 25-26; Tex. Br. 3, 14) that the disclosure is somehow *more* intrusive because it references state-sponsored programs thus gets the burden inquiry backwards. The disclosure is *less* burdensome because it makes plain that the State, rather than the clinics, is the source of the referenced factual information. No reasonable patient could mistake the disclosure as reflecting the clinics' views.

Fourth, the two-sentence Medical Services Disclosure does not prevent clinics "from conveying any additional information" to patients. *See Milavetz,*

559 U.S. at 250. Clinics remain free to encourage women to continue a pregnancy rather than obtain an abortion. *See* Pet'rs Br. 1, 5-6. They may continue to express their "profound moral and ideological disagreement" with abortion. *See id.* at 1. And they may advise patients to seek out pregnancy-related services other than the programs offered by California, and may provide patients with information about such services—including, for example, adoption agencies. *See id.* Because the Medical Services Disclosure does not affirmatively restrict *any* speech by the clinics, and instead requires only a modest disclosure alongside many other disclosures of equally uncontroverted facts, it imposes little if any burden on the clinics' speech.

Indeed, the Medical Services Disclosure is far less intrusive than the mandated disclosures that abortion providers often must give to their patients under other States' laws. Many of the rules applicable to abortion providers require physicians to disclose public programs and third-party resources aimed *solely* at encouraging a woman to continue rather than terminate her pregnancy—rather than, as here, requiring disclosure of a broad range of pregnancy-related healthcare options.[10] Likewise, many of the rules applicable to abortion providers dictate the precise format of the disclosures and require them to be

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[10] *See, e.g.*, Tex. Health & Safety Code § 171.012 (disclosures about medical assistance benefits for prenatal, neonatal, and childbirth care, and brochure listing agencies that offer alternatives to abortion); S.D. Codified Laws § 34-23A-10.1 (disclosure stating that, inter alia, "information on discontinuing a drug-induced abortion is available on the [State's] Department of Health website").

provided in a live oral conversation in which the physician must convey the state-mandated information through his or her own voice.[11] Such requirements intrude far more on the physician's own speech than a requirement to include a written notice in a packet of forms or a sign on the wall among other posters. And unlike the Medical Services Disclosure, the disclosures required of abortion providers are usually lengthy and complicated, mandating several different multi-pronged disclosures about not only various available resources but also the risks of abortion or the probable gestational age of the fetus.[12] If these more intrusive disclosure statutes withstand First Amendment scrutiny—a point on which the amici States take no position in this brief, but that petitioners and their amici assert—then California's modest and more balanced disclosure rule necessarily does as well.

In light of the undisputed accuracy of the facts conveyed in the Medical Services Disclosure, and the further limitations that California has placed on the disclosure, there is no basis for petitioners' complaint that they are being required to "advertise for abortion" (Pet'rs Br. 1; *see also id.* at 49; U.S. Br. 10, 24-25). The Medical Services Disclosure simply lacks any of the indicia of endorsement or encouragement that would cause a mandatory disclosure to cross the line from merely conveying facts to impermissibly "forc[ing] citizens to confess by word or act their faith" in a political message. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Petitioners' opposition to the disclosure ultimately boils down to an assertion that licensed clinics are entitled to keep

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[11] *See* Tex. Health & Safety Code § 171.012(b).

[12] *See* Tex. Health & Safety Code § 171.012(a).

patients in the dark about the very medical choices for which they visited a clinic in the first place. But this Court has made clear that the opposite is true: the strong First Amendment interest in providing individuals with undisputed factual information that they need to make choices outweighs any minimal interest that a regulated entity might have in maintaining ignorance about such facts. *See Zauderer*, 471 U.S. at 651. And the States' interest in ensuring informed decision-making is particularly acute in the context of healthcare, where patients often must make highly personal decisions about whether to use the medical services offered by one practitioner, or choose different medical options provided by another practitioner. For this reason, a State may properly require a surgeon to inform patients about nonsurgical alternatives offered by other healthcare providers, or require a physician who diagnoses a patient with a terminal illness to notify the patient about palliative-care options as an alternative to aggressive treatment. In the healthcare context in particular, informing patients about the range of treatment options available to them does not impermissibly "advertise" those options, as petitioners contend; rather, it sensibly gives patients the comprehensive information they need to make fully informed decisions about their healthcare.

B. Mandatory Disclosures Can Provide Valuable Information Critical to an Individual's Choices Even When They Do Not Convey Information About the Speaker's Specific Services.

Petitioners and their amici contend that the Medical Services Disclosure does not satisfy *Zauderer*'s standards because the information provided by the disclosure does not concern the specific services offered by petitioners, but instead services provided by others. Pet'rs Br. 46-47; U.S. Br. 10, 24; Texas Br. 3, 14. But this asserted limitation takes too narrow a view of both the States' interest in mandating disclosures and the relationship between the services offered by the clinics and the services referenced in the Medical Services Disclosure. Disclosure requirements routinely mandate that regulated entities disclose services or resources that the entities do not themselves provide but that are available options to the individuals who are making decisions about the regulated entities' services.

Indeed, this Court made clear in *Casey* that a disclosure statute does not violate the First Amendment simply because it requires a medical practitioner to inform patients about resources that are offered by state agencies or other third parties rather than the practitioner. The statute challenged in *Casey* mandated that licensed physicians disclose to patients, prior to performing an abortion, not only the medical risks of abortion but also the availability of state-written materials listing information about "public and private agencies and services available to assist a woman through pregnancy," including adoption agencies, medical-assistance benefits, and paternal child support. 505 U.S. at 907; *see id.* at 881 (plurality op.).

Although the physicians did not themselves offer these other services, the Court upheld the statute as reasonably related to Pennsylvania's interests in promoting informed decision-making by patients. *See id.* at 884 (plurality op.).

Such disclosures about other options—even those not given by the provider in question—are common in the healthcare context. Hospitals and birthing centers must provide parents with information about third-party service providers who give vaccines, educate parents about health risks, or assist with installing child car seats.[13] Healthcare practitioners must disclose information about state-sponsored programs that help patients quit drinking, smoking, or using drugs. *See* N.Y. Pub. Health Law § 2997-b; *id.* § 2803-u. And physicians, nursing homes, and hospitals are required to inform terminally ill patients about hospice care and other end-of-life options that the regulated professionals do not necessarily provide. *See* N.Y. Pub. Health Law § 2997-d(2); *see* Cal. Health & Safety Code § 442.5(a)(1) (notification of patient's right to "comprehensive information and counseling regarding legal end-of-life options").

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[13] *See, e.g.*, Ill. Comp. Stat. ch. 410, 235/4 (disclosure of where parents may obtain pertussis vaccine); N.J. Stat. § 26:2N-7.1 (disclosure about "pertussis vaccine for adults"); Tex. Health & Safety Code § 161.501(a)(1) (disclosure of "names, addresses, and phone numbers of professional organizations that provide postpartum counseling and assistance to parents"); Cal. Veh. Code § 27363.5 (disclosure about services that provide "information and assistance relating to child passenger restraint system"); Pa. Cons. Stat. tit. 75, § 4583 (hospitals must disclose "loaner or rental programs for child restraint devices that may be available in the community").

In many other contexts as well, States require a regulated entity to make disclosures that reference public or private services that are closely related to the entity's services, even though the entity does not provide every service referenced by the disclosure. For example, employers must post signs informing employees about public enforcement agencies that provide resources related to minimum-wage requirements, antidiscrimination rules, migrant-worker protections, veteran rights, or workplace-safety rules—even though the employer does not offer these employee-protection services themselves (and may prefer that employees not avail themselves of those services). *See, e.g.*, N.Y. Lab. Law § 198-d (minimum wage); 12 N.Y.C.R.R. § 142-2.8 (minimum wage); N.Y. Dep't of Labor, Poster for Miscellaneous Industry Employees (internet) (stating that employees who "need more information or want to file a complaint" about minimum-wage violations may call state agency's listed telephone number).[14] And real-estate sellers must distribute a pamphlet listing public programs that test for lead paint and provide information about lead-paint hazards, although the sellers do not offer such testing or information. *See* 40 C.F.R. § 745.107(a)(1); U.S. EPA, et al., *Protect Your Family from Lead in Your Home* 8, 15-17 (internet).

These and many other disclosure rules demonstrate that a disclosure need not relate solely to the specific services provided by the regulated entity

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[14] *See also, e.g.*, 9 N.Y.C.R.R. § 466.1(a) (antidiscrimination); N.Y. Div. of Human Rights, Poster (internet) (stating that individuals who experience discrimination may call state agency's listed telephone numbers); N.Y. Workers' Comp. Law §§ 13-a(2), 51, 229(1).

to be "reasonably related" to a State's interests in protecting and informing state residents. *See Zauderer*, 471 U.S. at 651. Instead, the States have a broader interest in providing individuals with any information that is important to a choice that the individual may make. And it is reasonable for States to ask a regulated entity to make such a disclosure when its business or services necessarily involve a class of individuals who are making such choices—and who would directly benefit from receiving that information. For example, maternity wards serve patients who must care for an infant and need to make choices about how to set up their homes; physicians who diagnose a patient with a terminal illness provide medical care to patients who face end-of-life decisions; and employers provide a workplace to employees who experience labor-law violations and are trying to decide whether to file a complaint. Mandatory disclosures under these circumstances appropriately target an audience that the State may reasonably determine requires certain information because they are facing an important choice. And a disclosure can meaningfully inform that choice by letting individuals know about other options that are indisputably available to them.

The Medical Services Disclosure reflects such a state interest. The patients who visit the licensed medical clinics covered by the FACT Act typically need to decide which pregnancy-related services to use, including both the services offered by the clinics and other services that a particular clinic may not offer. The services offered by the clinics are thus part of "the full spectrum" of available pregnancy-related care that their patients are likely to be interested in, and that the Medical Services Disclosure addresses. (J.A.

70.) Requiring licensed clinics to notify patients about the full range of available medical treatments is thus reasonably related to the State's interest in ensuring that such pregnancy-related decisions are well informed.

The importance of the Medical Services Disclosure is heightened by the fact that limited-service clinics like petitioners often provide false or misleading information to patients—thus creating misimpressions that only a mandatory disclosure can timely dispel. As the legislative record of the FACT Act makes clear, and as amici States have learned through experience, some limited-service clinics have falsely suggested that they provide abortion services, misleadingly advised that a miscarriage could obviate the need for an abortion, and incorrectly stated that a sonogram could inform the patient about the likelihood of such a miscarriage. See *supra* at 5-7. These practices are often designed to discourage pregnant patients from seeking out information about available pregnancy services and encourage patients to instead delay their decisions about pregnancy. See *supra* at 6-7. The States have strong interests in combatting such practices, which not only confuse patients about pregnancy services but also undermine maternal and fetal health, erode women's ability to undergo a medication-induced abortion rather than a surgical abortion, and risk preventing women from exercising their constitutional right to choose abortion at all. The Medical Services Disclosure reasonably protects patients from such dangers by providing them with information about available pregnancy services before it is too late for patients to utilize this information to make thoughtful and fully informed decisions about pregnancy. *See Casey*, 505 U.S. at 884 (plurality op.); *see*

also Milavetz, at 559 U.S. at 251-52 (upholding disclosure rule that combatted consumer deception and confusion).

C. California Reasonably Determined That Other Methods, Such as a State-Sponsored Education Campaign, Would Be Less Effective Than the Medical Services Disclosure at Timely Notifying Patients About Pregnancy Services.

Because the Medical Services Disclosure reasonably furthers California's interests, no further tailoring must be shown to satisfy the First Amendment. *See Milavetz*, 559 U.S. at 250-51. But even if some further tailoring were necessary, petitioners and their amici are incorrect in arguing that alternative means of disseminating information about pregnancy-related services, such as a publicly funded education campaign, would accomplish California's goals as effectively as the Medical Services Disclosure. *See* Pet'rs Br. 55; Texas Br. 15-16; U.S. Br. 28-29. As the amici States have learned through experience, a general public-advertising campaign is often less effective than a targeted disclosure rule at reaching specific individuals who need information during a particular timeframe. Although general information campaigns help educate the public at large about a topic, the broad sweep of such campaigns results in the information reaching many state residents when they are not actually facing any decision for which the information is relevant and thus are unlikely to pay attention to the information. Disclosure laws remedy this problem by funneling information to specific individuals while they are making a time-sensitive decision.

For example, many people are unlikely to focus on calorie-count information if they receive such information in a state-sponsored sign or public advertisement. But people are more likely to understand and utilize such information if they receive it while they are "standing at a [fast-food] counter" or "sitting down at a table reviewing a menu" to decide which foods to eat. *See* Keystone Ctr., *The Keystone Forum on Away-From-Home Foods: Opportunities for Preventing Weight Gain and Obesity—Final Report* 77 (May 2006) (recommending point-of-sale calorie disclosures); *see also New York State Rest.*, 556 F.3d at 136. Disclosure laws that require restaurants to post calorie information at the point of sale thus reasonably further the government's public interests, notwithstanding the availability and distinct usefulness of a general public education campaign about obesity and calorie intake. *See New York State Rest.*, 556 F.3d at 134-36.

Common sense likewise dictates that most healthy people will not pay attention to a general information campaign about palliative care because they have no immediate need for end-of-life services—leaving them uninformed about pain management, hospice care, and other end-of-life options if they are later faced with a terminal diagnosis. *See* Letter from Richard Gottfried, Chair, N.Y. State Assembly Comm. on Health to Peter Kiernan, Counsel to the Governor of New York, *in* Bill Jacket for Ch. 331 (July 1, 2010), at 9. Unlike a general information campaign, requiring physicians to notify patients about palliative-care services when a terminal diagnosis is given provides patients with critical information when they are focused on end-of-life decisions and can utilize the information to make decisions about their own

medical treatment and personal comfort. *See id.*; *see also* Letter from Lois Aronstein, State Director AARP N.Y. to David Paterson, Governor of New York, *in* Bill Jacket for Ch. 331 (July 20, 2010), at 32.

The availability of pregnancy services is precisely the type of information that is simply not salient to most women unless they are pregnant or are anticipating pregnancy. A state-sponsored education campaign about available pregnancy services would thus reach many women when they are not paying attention to such information, leaving them without critical information when they unexpectedly become pregnant and need to make time-sensitive decisions about their medical care. The Medical Services Disclosure reasonably addresses this problem by ensuring that women receive information about available treatments when they are receiving pregnancy care from a clinic and thus actively in need of information about pregnancy-related services.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the court of appeals.

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